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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 679

[Docket No. 050722198-6084-02; I.D. 071805B]

RIN 0648-AS93

#### Fisheries of the Exclusive Economic Zone Off Alaska; Groundfish Observer Program

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Final rule.

**SUMMARY:** NMFS issues a final rule to amend regulations supporting the North Pacific Groundfish Observer Program (Observer Program). This action is necessary to revise requirements facilitating observer data transmission, improve support for observers, and provide consistency with current regulations. The final rule will promote the goals and objectives of the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area and the Fishery Management Plan for Groundfish of the Gulf of Alaska (FMPs).

**DATES:** Effective on May 22, 2006.

**ADDRESSES:** Copies of the Regulatory Impact Review/Final Regulatory Flexibility Analysis (RIR/FRFA) prepared for this action may be obtained from the NMFS Alaska Region, P.O. Box 21668, Juneau, AK 99802, Attn: Records Officer, and the Alaska Region, NMFS, website at [www.fakr.noaa.gov](http://www.fakr.noaa.gov).

Written comments regarding the burden-hour estimates or other aspects of the collection-of-information requirements contained in this final rule may be submitted to NMFS, Alaska Region, and by email to [David\\_Rostker@omb.eop.gov](mailto:David_Rostker@omb.eop.gov) or fax to 202-395-7285.

**FOR FURTHER INFORMATION CONTACT:** Jason Anderson, 907-586-7228, or [jason.anderson@noaa.gov](mailto:jason.anderson@noaa.gov).

#### SUPPLEMENTARY INFORMATION:

##### Background

NMFS manages the U.S. groundfish fisheries of the Bering Sea and Aleutian

Islands Management Area (BSAI) and Gulf of Alaska (GOA) in the Exclusive Economic Zone under the FMPs. The North Pacific Fishery Management Council (Council) has prepared the FMPs pursuant to the Magnuson-Stevens Fishery Conservation and Management Act. Regulations implementing the FMPs appear at 50 CFR part 679. General regulations that pertain to U.S. fisheries appear at subpart H of 50 CFR part 600.

The Council adopted and NMFS approved and implemented the current "interim" Observer Program (Observer Program) in 1996 (61 FR 56425, November 1, 1996). The Observer Program was extended on four occasions: through 1998 (62 FR 67755, December 30, 1997), through 2000 (63 FR 69024, December 15, 1998), through 2002 (65 FR 80381, December 21, 2000), and through 2007 (67 FR 72595, December 6, 2002). The Observer Program develops regulations for the collection of information necessary for the conservation and management of the groundfish fisheries managed under the FMPs. Regulations implementing the Observer Program at § 679.50 require observer coverage aboard catcher vessels, catcher/processors, motherships, and shoreside and stationary floating processors that participate in the groundfish fisheries off Alaska and establish vessel, processor, and observer provider responsibilities relating to the Observer Program.

Timely electronic communication between the fishing industry and NMFS of catch reports submitted to NMFS by industry and observers is crucial to the effective in-season monitoring of groundfish quotas and protected species catch allowances. In July 1995, NMFS issued a final rule that required all catcher/processors, motherships, and shoreside processors that process groundfish to have computer hardware and software that would enable observers to send electronic data to NMFS (60 FR 34904, July 5, 1995). In October 2003, a final rule was published (68 FR 58038, October 8, 2003) that extended the requirements to all catcher vessels that are required to carry an observer whenever fishing.

Regulations describing hardware and software requirements for electronic submission of observer reports are found at § 679.50(g)(1) and (g)(2). This electronic data submission and communications system is called the observer communications system (OCS, previously referred to as "ATLAS"). This system consists of computers and communications equipment supplied by catcher vessels, catcher/processors,

motherships, and shoreside or stationary floating processors, and custom software provided by NMFS. The OCS system allows observers to rapidly process and report the data they collect to NMFS. Its use on catcher vessels, catcher/processors, motherships, and shoreside or stationary floating processors has led to more timely and accurate fisheries data.

The proposed rule for this action was published in the **Federal Register** on August 8, 2005 (70 FR 45638), with comments invited through September 7, 2005. NMFS received three letters of comment that contained five separate comments. Comments are summarized and responded to under Response to Comments, below.

#### Revisions to OCS Regulations

Observer Program staff periodically upgrade the software component of the OCS. Upgraded OCS software improves overall data quality. This action amends regulations that require catcher vessels, catcher/processors, motherships, and shoreside or stationary floating processors carrying OCS equipment to install hardware upgrades to meet current technology standards necessary to support OCS software and facilitate its installation. Presently, regulations at § 679.50(g)(1)(iii)(B)(1) and (g)(2)(iii)(B)(1) require a minimum of a Windows 9x or NT compatible operating system, both of which are older, now unsupported operating systems. This action amends regulations at § 679.50(g)(1)(iii)(B)(1) and (g)(2)(iii)(B)(1) to require a Windows 98 or more recent operating system such as Windows 2000, Millennium, or XP. NMFS believes Windows based operating systems are acceptable because the upgraded software component is only compatible with Windows based operating systems. The regulations also are revised to require catcher vessels, catcher/processors, motherships, and shoreside or stationary floating processors to provide for observers a personal computer with a functioning compact disc (CD) drive. Additionally, personal computers must have a minimum random access memory (RAM) of 256 megabytes.

Personal computers must operate the larger, more sophisticated software and database programs provided by NMFS. The new NMFS software requires an upgraded operating system to function. The software now is stored on a CD medium, which facilitates easier and efficient installation. Windows 95 is no longer supported by the manufacturer, so newer Windows versions are necessary.

### Other Revisions

Regulations at § 679.2 contain definitions for terms used elsewhere in part 679. Regulations at § 679.50(c) describe observer coverage requirements for catcher vessels, catcher/processors, and motherships engaged in directed fishing for groundfish. However, in § 679.2 the first paragraph of the current definition of “directed fishing” is included under the heading, “With respect to groundfish recordkeeping and reporting.” This action revises the heading of the first paragraph of the definition for “directed fishing” to read, “Unless otherwise indicated” to clarify that the definition also applies to observer coverage regulations.

Regulations at § 679.28 describe requirements for scales, observer sampling stations, bins for volumetric estimates, and vessel monitoring system hardware. Section 679.28(g)(1) provides a general description of catch monitoring and control plans (CMCPs) and § 679.28(g)(4)(iii) describes a component of the NMFS inspection process for CMCPs. These sections incorrectly cite § 679.28(g)(6) as the paragraph detailing catch monitoring and control standards, which are found in paragraph (g)(7). This action corrects this error by replacing the reference to paragraph (g)(6) in § 679.28(g)(1) and (g)(4)(iii) with paragraph (g)(7).

### Response to Comments

NMFS received three letters of comment that contained five separate comments. The following summarizes and responds to these comments.

*Comment 1:* Computer upgrades do not address occurrences of intentional misreporting by observers.

*Response:* NMFS agrees. This action is intended to address data quality and timeliness issues associated with observer data entry and transmittal. Regulations governing observer conduct, including data reporting accuracy, are found at § 679.50(j)(2). Those regulations are not being revised at this time.

*Comment 2:* Observers should be held financially responsible if they are late to their assignments.

*Response:* North Pacific groundfish observers are employed by observer providers. Vessel owners contract directly with observer providers for required observer services. Under this arrangement, observer providers are responsible for the timeliness of their employees when meeting contractual arrangements with a vessel owner. Regulations at § 679.50(i)(2)(v) require an observer provider to provide its observer employees salaries and other

benefits according to their employment contracts. Otherwise, NMFS does not intervene between observer providers and their observer employees on personnel issues.

*Comment 3:* For flights to Dutch Harbor, airline baggage restrictions limit passengers to a maximum of two 50 pound bags per person. Passengers with additional baggage must agree to be voluntarily separated from their additional baggage. Observers typically fly with two personal bags and one 70 pound basket of sampling gear. Observers may be separated from their baggage and the proposed rule does not account for this restriction. Instead, NMFS and observer providers should work cooperatively with airline carriers to resolve this issue.

*Response:* NMFS realizes observers may be separated from their gear because of aircraft weight and balance requirements. The proposed action would not regulate aircraft loading standards because NMFS does not have the authority to do so. Rather, the proposed action would have required that observer providers only deploy observers who had their gear and personal items with them at the time a vessel they are assigned to leaves port to go fishing. However, NMFS agrees that standard airline baggage restrictions could affect the ability of observer providers to deploy observers. NMFS recognizes that alternative solutions may exist that do not affect observer providers in this manner. As a result, NMFS has decided the revision to regulations governing observer deployment logistics will not be included in the final rule.

*Comment 4:* If an observer is separated from his or her personal items and sampling gear, observer providers should be allowed to obtain a new set of sampling gear from NMFS and purchase clothes and personal items for the observer. In the past, these actions have not resulted in hardship for the observer.

*Response:* NMFS agrees that less costly alternative solutions may exist that do not compromise an observer's safety, comfort, or ability to complete his or her duties. For example, NMFS has offices in Dutch Harbor and Kodiak, Alaska, that may be able to supply an observer with an additional set of gear. However, observers often embark after business hours, or from locations that do not have NMFS offices. In the past, observers have borrowed sampling gear from other observers. However, observers also are issued safety gear, including immersion suits and personal flotation devices (PFDs). NMFS staff regularly tests this safety equipment for

defects, and each observer has an incentive to maintain his or her own personal gear. Borrowed or used safety equipment may not be properly tested or maintained. Safety equipment also is issued to observers based on their relative body size, and poorly fitted or maintained safety equipment could create a significant hazard for observers.

Although observers may be able to purchase clothing and personal items from stores or borrow them from other observers, observers may not be able to borrow properly fitting clothes, a store may not be available to purchase clothing or personal items, or a store may not have the items needed. NMFS also is concerned that observers separated from their personal gear could be deployed without necessary personal items that cannot be borrowed or purchased, such as medication or spare glasses.

NMFS is concerned about these issues and new solutions that the agency did not consider have been proposed through public comment. NMFS will work with observer providers to find alternative solutions to address situations when an observer is separated from his or her gear and personal items. If necessary, NMFS will propose regulatory measures to address these concerns in the future. Because NMFS is now aware of other possible solutions, NMFS is removing from this rule proposed revisions to observer provider responsibilities for observer deployment logistics.

*Comment 5:* The commentor says observers being separated from their gear is a rare occurrence, but that the requirement to keep observers and gear together would have significant effects. For example, vessels may be kept from fishing if they must wait for an observer's gear to arrive. Additionally, observer providers may choose to deploy another observer rather than force a vessel to wait for an observer's gear. Through no fault of his or her own, the observer who was separated from his or her gear may lose a vessel assignment, and the observer provider would have already incurred the costs of deploying the observer.

*Response:* NMFS agrees a vessel may be forced to seek an alternate observer if its assigned observer is separated from his or her gear. This situation is most likely to occur for larger vessels that are required to carry an observer at all times. These vessels typically depart from larger ports where additional observers are available. Smaller vessels usually use smaller ports and are required to carry an observer only 30 percent of their fishing days. Thus, the smaller vessels may be able to forego

observer coverage for a trip until the observer's gear and personal belongings arrive. These smaller ports also often are more remote and are less likely to be able to provide alternative gear and personal effects, as described above.

Based on information from observer providers, an observer's airfare is typically passed on to the fishing company or companies using observer services. If an observer is separated from his or her gear and replaced by another observer, the observer provider has a financial incentive to arrange deployment for the observer on another vessel. NMFS believes that an observer separated from his or her gear would be assigned to another vessel or shoreside operation.

While NMFS believes observers would not be affected in the manner described in the comment above, NMFS is removing from the final rule the proposed revisions to observer provider responsibilities for observer deployment logistics. Justification for removing this provision is included in the response to comments three and four.

#### *Change from the Proposed Rule*

The proposed rule included a provision at § 679.50(i)(2)(vi)(A)(1) to require an observer provider to provide all necessary transportation, including arrangements and logistics, to ensure the observer and his or her gear and personal belongings arrive at the initial location of deployment and to all subsequent vessel and shoreside or stationary floating processor assignments during that deployment. For a variety of reasons, including incorrect routing of luggage or weight restrictions on airplanes, during travel to an assignment, an observer occasionally becomes separated from his or her personal belongings and gear necessary to conduct sampling duties. If this occurs, luggage normally will be delivered on a subsequent flight. Deploying an observer to a vessel without the observer's personal belongings or gear necessary to conduct sampling duties could compromise an observer's safety, comfort, and ability to complete his or her duties.

NMFS received public comments that said the revision would create unforeseen costs and logistical issues. These costs and logistical issues were not analyzed in the EA/RIR/IRFA prepared for this action. While NMFS is concerned about the safety and comfort of observers when they are separated from their gear, based on information from observers and observer providers, observer providers rarely deploy observers or ask observers to deploy without their own personal gear. NMFS will work with

observer providers to address these situations. Solutions may exist that would impose less cost on observer providers and vessels than the options available under the proposed rule. NMFS may propose similar regulations in the future if an alternative acceptable solution is not found. For these reasons, the agency removed proposed revisions to regulations at § 679.50(i)(2)(vi)(A)(1) described above from the final rule.

#### **Classification**

The Administrator, Alaska Region, NMFS, determined that the regulatory amendment is necessary for the conservation and management of the groundfish fisheries off Alaska and that it is consistent with the Magnuson-Stevens Fishery Conservation and Management Act and other applicable laws.

This final rule has been determined to be not significant for purposes of Executive Order 12866.

An Initial Regulatory Flexibility Analysis (IRFA) was prepared for the proposed rule, and described in the classifications section of the preamble to the rule. The public comment period ended on September 7, 2005. No comments were received on the IRFA.

NMFS prepared a final regulatory flexibility analysis (FRFA). The FRFA incorporates the IRFA and a summary of the analyses completed to support the action. A copy of this analysis is available from NMFS (see **ADDRESSES**). A summary of the analysis follows.

This action requires vessels and shoreside or stationary floating processors already subject to OCS requirements to adopt hardware upgrades to meet current technology standards necessary to support the OCS software. This includes all motherships, catcher/processors, shoreside or stationary floating processors and catcher vessels required to carry an observer at all times. Additionally, the final rule includes several clarifications and corrections to current regulations. These actions are intended to revise requirements for the facilitation of observer data transmission, improve support for observers, and provide consistency with current regulations.

Alternative 1 described in the EA/RIR/IRFA is the status quo alternative. Current regulations regarding computer hardware and software would remain in effect.

Alternative 2 would: (1) require all catcher vessels, catcher/processors, motherships, and shoreside or stationary floating processors currently subject to OCS requirements to upgrade their computing hardware to a minimum operating system of Windows

98 and 256k of RAM; (2) require observer providers to ensure observers are deployed with their personal belongings and gear; and (3) other non-substantive administrative changes to current regulations.

In addition to the requirements in Alternative 2, Alternative 3 would require all catcher vessels, catcher/processors, motherships, and shoreside or stationary floating processors currently subject to OCS requirements to upgrade their computer hardware to a CD drive.

All motherships have gross revenues in excess of \$3.5 million and are considered large entities. Data available for 2003, indicate that 22 of the 82 catcher/processors active in the groundfish fisheries that year would be considered small entities. All five observer provider companies are considered small entities. Confidentiality restrictions require NMFS to report gross revenue information in aggregate of four or more entities. These restrictions prevent NMFS from reporting the number of catcher vessels and shoreside or stationary floating processors regulated under this action for small entities because each group is no larger than four.

The preferred alternative reflects decisions, already incorporated into the Observer Program, to minimize the burden on small entities. Catcher vessels less than 60 feet (18.3 m) length overall, which include the greatest numbers of SBA defined small entities, are exempted from observer coverage. There were 740 of these vessels fishing hook and line, pot, and trawl gear in 2003. The exclusion of this large fleet of fishing vessels from the observer program has meant the sacrifice of information that would have been useful for fisheries management. The exclusion has been motivated by recognition that there are unique difficulties associated with placing observers on some of these small vessels. Requiring these small entities to carry observers may have placed an unreasonable and disproportional economic and operational burden on them.

NMFS received public comment on the proposed rule saying that unforeseen costs and logistical issues would be created under a revision that would require observer providers to ensure observers are deployed with their personal belongings and gear. NMFS believes there is an opportunity to work with observer providers to address these situations, and this revision was removed from the final rule. Because all observer providers are

considered small entities, this change from the proposed rule to the final rule decreases the burden on small entities.

This final rule contains a collection-of-information requirement subject to the Paperwork Reduction Act (PRA) that has been approved by OMB under control number OMB 0648-0330. Public reporting burden for catch monitoring and control plans (CMCP) are estimated to average 40 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate, or any other aspect of this data collection, including suggestions for reducing the burden, to NMFS (see ADDRESSEES) and by e-mail to David\_Rostker@omb.eop.gov, or fax to (202) 395-7285.

Notwithstanding any other provision of the law, no person is required to respond to, and no person shall be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB Control Number.

List of Subjects in 50 CFR Part 679

Alaska, Fisheries, Reporting and recordkeeping requirements.

Dated: April 14, 2006.

James W. Balsiger,

Acting Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service

For the reasons set out in the preamble, 50 CFR part 679 is amended as follows:

PART 679—FISHERIES OF THE EXCLUSIVE ECONOMIC ZONE OFF ALASKA

1. The authority citation for part 679 continues to read as follows:

Authority: 16 U.S.C. 773 et seq.; 1540(f); 1801 et seq.; 1851 note; 3631 et seq.

2. In § 679.2, in the definition of “directed fishing” paragraph (1) is revised to read as follows:

§ 679.2 Definitions.

\* \* \* \* \*

Directed fishing means:

(1) Unless indicated otherwise, any fishing activity that results in the retention of an amount of a species or species group on board a vessel that is greater than the maximum retainable amount for that species or species group as calculated under § 679.20.

\* \* \* \* \*

3. In § 679.28, paragraphs (g)(1) and (g)(4)(iii) are revised to read as follows:

§ 679.28 Equipment and operational requirements.

\* \* \* \* \*

(g) \* \* \*

(1) What is a CMCP? A CMCP is a plan submitted by the owner and manager of a processing plant, and approved by NMFS, detailing how the processing plant will meet the catch monitoring and control standards detailed in paragraph (g)(7) of this section.

\* \* \* \* \*

(4) \* \* \*

(iii) A proposed CMCP detailing how the processor will meet each of the performance standards in paragraph (g)(7) of this section.

\* \* \* \* \*

4. In § 679.50, paragraphs (g)(1)(iii)(B)(1) and (g)(2)(iii)(B)(1) are revised to read as follows:

§ 679.50 Groundfish Observer Program applicable through December 31, 2007.

\* \* \* \* \*

(g) \* \* \*

(1) \* \* \*

(iii) \* \* \*

(B) \* \* \*

(1) Hardware and software. Making available for use by the observer a personal computer in working condition that contains: a full Pentium 120Mhz or greater capacity processing chip, at least 256 megabytes of RAM, at least 75 megabytes of free hard disk storage, a Windows 98 (or more recent) compatible operating system, an operating mouse, a 3.5-inch (8.9 cm)

floppy disk drive, and a readable CD ROM disk drive. The associated computer monitor must have a viewable screen size of at least 14.1 inches (35.8cm) and minimum display settings of 600 x 800 pixels. The computer equipment specified in paragraph (g)(1)(iii)(B) of this section must be connected to a communication device that provides a point-to-point modem connection to the NMFS host computer and supports one or more of the following protocols: ITU V.22, ITU V.22bis, ITU V.32, ITU V.32bis, or ITU V.34. Personal computers utilizing a modem must have at least a 28.8 kbs Hayes-compatible modem.

\* \* \* \* \*

(2) \* \* \*

(iii) \* \* \*

(B) \* \* \*

(1) Hardware and software. Making available for use by the observer a personal computer in working condition that contains: a full Pentium 120Mhz or greater capacity processing chip, at least 256 megabytes of RAM, at least 75 megabytes of free hard disk storage, a Windows 98 (or more recent) compatible operating system, an operating mouse, a 3.5-inch (8.9 cm) floppy disk drive, and a readable CD ROM disk drive. The associated computer monitor must have a viewable screen size of at least 14.1 inches (35.8cm) and minimum display settings of 600 x 800 pixels. The computer equipment specified in paragraph (g)(2)(iii)(B) of this section must be connected to a communication device that provides a point-to-point modem connection to the NMFS host computer and supports one or more of the following protocols: ITU V.22, ITU V.22bis, ITU V.32, ITU V.32bis, or ITU V.34. Personal computers utilizing a modem must have at least a 28.8 kbs Hayes-compatible modem.

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